

**Letter of Findings: 09-0327
Sales and Use Tax
For the Years 2006 and 2007**

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ISSUES

I. Sales Tax—Exempt Sales.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; [45 IAC 2.2-8-12](#).

Taxpayer argues that sales it made to several of its customers were exempt from sales tax.

II. Use Tax—Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-3-4; [45 IAC 2.2-1-1](#).

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer has business operations in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed tax, interest, and negligence penalties for the 2006 and 2007 tax years. The Department found that Taxpayer had made a number of sales to Indiana customers without collecting sales tax or obtaining the necessary exemption certificates. The Department also determined that Taxpayer had purchased a "fence" without either paying sales tax at the time of the purchase or remitting use tax to the Department. Taxpayer protested the tax and penalty assessments. An administrative hearing was held, and this Letter of Findings results.

I. Sales Tax—Exempt Sales.

DISCUSSION

Taxpayer asks that the Department accept additional exemption certificates and that the amount of its sales tax assessment be modified to reflect those certificates.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

During the audit, taxpayer was unable to provide a number of exemption certificates. The auditor was therefore unable to verify that those sales were exempt from the sales tax. The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose."

The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." [45 IAC 2.2-8-12\(d\)](#).

There is no question that taxpayer entered into retail transactions for which – absent an exemption – taxpayer was required to collect sales tax. Taxpayer has somewhat belatedly supplied exemption certificates purportedly from its customers.

The Department is prepared to accept the exemption certificates and the Audit Division is requested to review the audit report and make whatever adjustments it deems appropriate but with one cautionary word. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

FINDING

To the extent that taxpayer has provided exemption certificates from its customers, Taxpayer's protest is sustained.

II. Use Tax—Imposition.

DISCUSSION

The Department found that Taxpayer had purchased a "fence" without paying sales tax at the time of

purchase, and assessed used tax on the purchase. Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer failed to pay sales tax at the time of purchase, the Department found that the Taxpayer's purchase was subject to use tax.

Taxpayer protests the imposition of use tax on its purchase of the fence. Taxpayer asserts that the purchase was for "subcontracted labor," which is the equivalent to services and is exempt from sales and use tax. During the course of the protest, Taxpayer submitted an invoice demonstrating the manner in which it was billed for the "fence."

However, the evidence presented by Taxpayer demonstrates that Taxpayer's invoice represented a unitary transaction, which would subject the entire amount to use tax. Pursuant to IC § 6-2.5-1-2(b), services that are performed as part of a retail "unitary transaction" are subject to sales and use tax. A retail "unitary transaction" is one in which items of personal property and services are furnished under a single order or agreement and for which a total combined charge or price is calculated. IC § 6-2.5-1-1(a). A unitary transaction includes all items of property and services for which a total combined selling price is computed irrespective of the fact that the cost of services, which would not otherwise be taxable, is included in the selling price. [45 IAC 2.2-1-1\(a\)](#). Therefore, since the "fence" was purchased as part of a "unitary transaction," the entire invoice is subject to tax.

FINDING

Taxpayer's protest is respectfully denied.

III. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "[I]f a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

[45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer has established that it does not owe some of the proposed assessments discussed in Issue I, Taxpayer has not affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is sustained as to Issue I; considering the exemption certificates offered by taxpayer, the Audit Division is requested to make whatever adjustments it deems appropriate. Taxpayer's protest is denied as to Issue II for the imposition of use tax. Taxpayer's protest is denied as to the imposition of penalty as discussed in Issue III.

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